SUPREME COURT, U.S.
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No. 93-37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TODD ALLEN DIMMIG,

Petitioner,

v.

ROBERT "Pete" WAHL, individually and as Sheriff of LaSalle County, Illinois, a body politic,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JANELLA L. BARBROW
Counsel of Record
COLLEEN C. COBURN
KNIGHT, HOPPE, FANNING & KNIGHT, LTD.
2860 River Road, Suite 400
Des Plaines, Illinois 60018
(708) 298-8000

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly applied *Upton v. Thompson* in the instant case?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert "Pete" Wahl, individually and as Sheriff of LaSalle County, Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit Court of Appeals' opinion in *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993).

STATEMENT OF THE CASE

The petitioner, a deputy sheriff for the LaSalle County Sheriff's Department, filed an action pursuant to 42 U.S.C. § 1983 against Robert "Pete" Wahl, individually and as Sheriff of LaSalle County, and LaSalle County, alleging he was discharged for refusing to participate in Wahl's re-election campaign for sheriff, in violation of his First and Fourteenth Amendment rights to freedom of political belief and association. (App. at 2, 6). Petitioner was a probationary employee at the time of his discharge. (App. at 2).

Wahl and LaSalle County moved for judgment on the pleadings. (App. at 2). The district court granted the motion, finding that under *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), a sheriff may use political considerations when determining who will serve as deputy sheriff. (App. at 6-8). Therefore, the district court dismissed the action. (App. at 8).

Petitioner appealed the dismissal of his action to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the decision of the district court, finding that under *Upton* a sheriff may use political considerations in determining who will serve as deputy sheriff. (App. at 4). The court therefore concluded that the petitioner's complaint lacked merit because the constitution permitted Wahl to discharge the petitioner for refusing to campaign for him. (App. at 4).

On April 15, 1993, petitioner was granted an extension until June 5, 1993 within which to file a petition for writ of certiorari. The subject petition for writ of certiorari was filed pursuant to that extension of time.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT COURT OF APPEALS' OPINION DECIDED NO NEW FEDERAL QUESTION WHICH WOULD WARRANT A GRANT OF CERTIORARI.

The lower court's opinion in the instant case did not address a novel issue of law. Nor did it adopt an unprecedented holding. Rather, it simply followed the precedent established within the Seventh Circuit which had found that political considerations are an appropriate job requirement for deputy sheriffs. *See Upton v. Thompson*, 930 F.2d 1209, 1218 (7th Cir. 1991), *cert. denied*, 503 U.S. ____, 112 S.Ct. 1262, 117 L.Ed.2d 491. Since the decision in question does not depart from earlier precedent, this Court should deny the petition for writ of certiorari.

II.

THE APPELLATE COURT CORRECTLY REFUSED TO DISTINGUISH BETWEEN POLITICALLY ACTIVE AND POLITICALLY INACTIVE DEPUTY SHERIFFS.

A. The Decision In The Instant Case Fell Squarely Within The Holding Of Earlier Precedent.

The holding of *Upton* was clear. It did not say that deputy sheriffs can be discharged if they actively oppose the sheriff politically; it provided that deputy sheriffs can be discharged for any political reason. As the express holding of *Upton* clearly stated:

> Based on this court's approval of political terminations in other contexts, we conclude that deputy sheriffs operate with a sufficient level of autonomy and discretionary authority to justify a sheriff's use

> of *political considerations* when determining who will serve as deputies.

930 F.2d at 1218 (emphasis added).

This holding was not simply the result of a poor choice of words, for the court again stated:

> Suffice it to say that under the First Amendment as interpreted by *Branti* . . . a sheriff may use *political considerations* when determining who will serve as deputy sheriff.

930 F.2d at 1218 (emphasis added).

Therefore, the appellate court followed precedent within the circuit in holding in the instant case that Illinois deputy sheriffs can be discharged for political considerations.

B. The Politically Active/Inactive Distinction Asserted By The Petitioner Is Inconsistent With *Elrod* And *Branti*.

Petitioner attempts to distinguish himself from the plaintiffs in *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991), *cert. denied*, 503 U.S. ____, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992), on the ground that he allegedly remained politically inactive while the deputy sheriffs in *Upton* were politically active. This asserted distinction is inconsistent with this Court's decisions regarding politically motivated discharges.

This Court's cases dealing with political discharges have long dealt with those fired for their failure to support their employer in a campaign, the so-called "politically inactive". For example, both *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2683, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) dealt with plaintiffs who were "politically inactive," in the sense that they did not actively oppose the defendants. In

Elrod, the plaintiffs allegedly were discharged or threatened with discharge because they were not affiliated with or sponsored by the Democratic party.

In *Branti*, the plaintiffs were discharged simply because they were Republicans and the new public defender was a Democrat. The plaintiffs did not campaign against or oppose the new public defender. In fact the public defender was not even an elected position; he was appointed by the county legislature.

Similarly, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), the plaintiffs were politically inactive. They alleged that they were denied promotions or jobs because they had not supported the Republican party, the party in power. They did not campaign against it; they simply were not members of it or did not have its support. 497 U.S. at 66-67.

In none of these cases did this Court distinguish between employees who were politically active and those who were politically inactive. Instead, this Court focused on the nature of the position held by the employee and whether political considerations were an appropriate requirement for that job, not whether that particular employee's activities disrupted the functioning of the office in question.

It would be inconsistent with the rationale underlying *Elrod* and *Branti* to change the focus in political discharge cases from the nature of the position held by the employee to the nature of the political activity engaged in by the employee. In *Elrod*, this Court recognized that some vital governmental interest may justify encroachment on the First Amendment rights of employees. 427 U.S. at 363, 367. Of the interests argued in support of the challenged practices of political patronage, the Court acknowledged

as valid the need for the political loyalty of some employees to assure that representative government is not undercut by tactics obstructing the implementation of the policies of the administration. 427 U.S. at 367. In order to appoint those who are politically loyal to certain positions, some employees may need to be discharged, not because they actively opposed the administration, but simply in order to make the positions available. In other words, the valid governmental interest recognized in *Elrod* had nothing to do with the individual employee's conduct. It had to do with whether it was appropriate for an elected official to fire employees, regardless of their activities or beliefs, so as to replace them with those loyal to him.

Again, in *Branti*, this Court focused on the issue from the viewpoint of the employer, not the employee. In deciding when certain employees can be discharged for political reasons, this Court noted that a position may be appropriately considered political even though it is not confidential or policymaking in character, and that party affiliation is not necessarily relevant to every confidential or policymaking position. 445 U.S. at 518. This Court concluded that political affiliation could be the reason for discharging a public employee where the hiring authority could demonstrate that party affiliation was an appropriate requirement for the effective performance of the public office involved. 445 U.S. at 518. This Court then examined the position of assistant public defender, not the nature of the political activity engaged in by the plaintiffs, in order to determine whether the political discharges were justified.

The Seventh Circuit Court of Appeals followed the *Branti* analysis in *Upton* to hold that political considerations are an appropriate requirement for the effective per-

formance of the position of deputy sheriff. 930 F.2d at 1215. The instant case dealt with a deputy sheriff allegedly discharged for political reasons. Therefore, the appellate court properly followed *Upton* in this case, regardless of the nature of the political activity or inactivity engaged in by the deputy sheriff. The test depends on the job he holds, not the nature of his conduct.

In *Branti*, this Court explicitly rejected an argument which would have made the analysis dependent upon the nature of the political activity engaged in by the plaintiffs. The petitioner in *Branti* argued that *Elrod* prohibited only dismissals resulting from an employee's failure to capitulate to political coercion. Thus, petitioner contended, as long as an employee was not asked to change his political affiliation or to contribute to or to work for a particular candidate, the employee could be dismissed with impunity. 445 U.S. at 516. This Court rejected the argument finding it would emasculate the principles of *Elrod*. 445 U.S. at 516.

The same considerations apply to petitioner's arguments in the instant case. Just as distinguishing between those who do not capitulate to political coercion and those not asked to change political affiliation would be inconsistent with *Elrod*, so too, distinguishing between those who are politically inactive and those who are politically active would be inconsistent with the principles involved. Those who voice their opinions would be afforded less First Amendment protections than those who remained silent. This somewhat incongruous result is at odds with traditional First Amendment analysis, which usually recognizes that greater protection is needed by those who speak out and say the unpopular.

Thus, petitioner's asserted distinction is at odds with the principles on which *Elrod* and *Branti* are based. Therefore, the instant case does not merit review by this Court.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JANELLA L. BARBROW
Counsel of Record
COLLEEN C. COBURN
KNIGHT, HOPPE, FANNING
& KNIGHT, LTD.
2860 River Road, Suite 400
Des Plaines, Illinois 60018
(708) 298-8000

Attorneys for Respondent